## Malaysia Building Society Bhd v KCSB Konsortium Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–2787–12 OF 2013
ABDUL WAHAB PATAIL, LINTON ALBERT, VERNON ONG JJCA
16 OCTOBER 2014

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*Land Law — Charges — Application to set aside — Mistake in instrument creating charge — Whether error or mistake was fatal so as to invalidate whole charge — Whether charge annexure could rectify situation — Whether error capable of correction by registrar of titles*

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KCSB Konsortium Sdn Bhd ('the respondent') entered into a privatisation agreement with the government of Malaysia for privatisation of a project to develop three pieces of land situated in Johor Bahru ('the land') into an army camp. The respondent then entered into an agreement with Kausar Corp Sdn Bhd ('Kausar') whereby it assigned all its rights and benefits under the privatisation agreement to Kausar). In return Kausar agreed to assume all of the respondent's obligations and liabilities under the privatisation agreement. Kausar then approached MBSB Development Sdn Bhd (MDSB) to become its joint venture partner in the land development project. Kausar and MDSB then executed a joint venture agreement to establish a joint venture company named Definite Pure Sdn Bhd ('DP') to carry out the land development project. At the request of DP, Malaysia Building Society Bhd (the appellant) provided two loan facilities to DP, namely a term loan of up to RM465m (the term loan) and an advance of up to RM65.1m (the advance). It was a term of the loan agreement between the appellant and DP that the respondent would create a third party charge in favour of the appellant on the land as security for the loan facilities. However, contrary to this term in the loan agreement the charge instrument, Form 16A, was registered as a first party charge instead of a third party charge. The Form 16A had stated that the charge was created for the purpose of securing the repayment to the appellant of a loan of RM465m to the respondent, or that the respondent was the borrower, which in fact was not true. Consequently the respondent applied to set aside the charge on the ground that the Form 16A creating the charge was an insufficient instrument that rendered the charge void. The appellant argued that the respondent was a party to the mistake and that it should not be allowed to benefit from its own error by having the charge set aside. Instead the appellant contended that the error or mistake was not fatal so as to invalidate the whole charge and that the court had the necessary jurisdiction under s 417 of the National Land Code ('the NLC') to order rectification of the charge. In the alternative, it was argued that the mistake could be rectified under s 380 of the NLC. The trial judge found that the mistake in the Form 16A was serious and fundamental in that it

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altered the status of the respondent from that of a mere third party chargor to a borrower of the loan from the appellant. The trial judge also rejected the appellant's argument that the court had the power to rectify the charge under s 380 of the NLC. Consequently the High Court set aside the charge for being void and bad in law. Hence the present appeal wherein the appellant submitted that the removal of the charge would be highly prejudicial to the appellant as it would be deprived of the security for the loan granted to DP.

**Held**, dismissing the appeal with costs:

(1) The authorities cited by the appellant in support of its case were distinguishable on the facts (see para 18).

(2) Under s 242 of the NLC, the Form 16A was a mandatory instrument for the creation of a charge. In the instant case, the mistake on the Form 16A was fundamental as it went to the root and character of the charge. In essence a first party charge was created instead of a third party charge. In the circumstances, the Form 16A as it stood was an insufficient instrument to create a first party charge as the respondent had not received the loan sum from the appellant. Thus, the trial judge was correct in finding that the charge annexure could not rectify the situation as the Form 16A was the only instrument recognised under s 242 of the NLC (see paras 19–20).

(3) The mistake was not a mere error or omission capable of correction by the registrar of titles within the meaning of s 380(1)(a) to (c) of the NLC (see para 21).

**[Bahasa Malaysia summary**

KCSB Konsortium Sdn Bhd ('responden') memasuki perjanjian penswastaan dengan Kerjaan Malaysia untuk penswastaan projek bagi membangunkan tiga bidang tanah yang terletak di Johor Bahru ('tanah tersebut') kepada kem askar. Responden kemudiannya memasuki perjanjian dengan Kausar Corp Sdn Bhd ('Kausar') di mana ia menyerahkan kesemua hak dan faedahnya di bawah perjanjian penswastaan kepada Kausar. Dalam balasan Kausar bersetuju untuk mengambil alih kesemua tanggungjawab dan liabiliti responden di bawah perjanjian penswastaan tersebut. Kausar kemudiannya menemui MBSB Development Sdn Bhd ('MDSB') untuk menjadi rakan kongsi usaha sama dalam projek pembangunan tanah tersebut. Kausar dan MDSB kemudiannya melaksanakan perjanjian usaha sama untuk menubuhkan syarikat usaha sama bernama Definite Pure Sdn Bhd ('DP') bagi menjalankan projek pembangunan tanah tersebut. Atas permintaan DP, Malaysia Building Society Bhd ('perayu') memberikan dua kemudahan pinjaman kepada DP, iaitu pinjaman bertempoh sehingga RM465 juta ('pinjaman bertempoh') dan pendahuluan sehingga RM65.1 juta ('pendahuluan'). Ia adalah terma perjanjian pinjaman di antara perayu dan DP bahawa responden akan

membentuk caj pihak ketiga memihak perayu ke atas tanah sebagai jaminan untuk kemudahan pinjaman. Walau bagaimanapun, bertentangan terma ini dalam perjanjian pinjaman surat cara caj, Borang 16A, didaftarkan sebagai caj pihak pertama tidak caj pihak ketiga. Borang 16A telah menyatakan bahawa caj dibentuk bagi tujuan menjamin pembayaran kepada perayu terhadap pinjaman sebanyak RM465 juta kepada responden, atau bahawa responden adalah peminjam, yang mana sebenarnya tidak betul. Akibatnya responden memohon untuk mengenepikan caj tersebut atas alasan bahawa Borang 16A yang membentuk caj adalah surat cara yang tidak mencukupi yang menyebabkan caj terbatal. Perayu berhujah bahawa responden adalah pihak kepada kesilapan dan bahawa ia tidak patut dibenarkan untuk mendapat faedah daripada kesilapannya sendiri dengan membuatkan caj diketepikan. Sebaliknya perayu berhujah bahawa kesalahan atau kesilapan tidak serius sehingga membatalkan keseluruhan caj dan bahawa mahkamah mempunyai bidang kuasa yang perlu di bawah s 417 Kanun Tanah Negara ('KTN') untuk memerintahkan pembetulan terhadap caj. Secara alternatif, ia dihujahkan bahawa kesilapan boleh dibetulkan di bawah s 380 KTN. Hakim perbicaraan mendapati bahawa kesilapan dalam Borang 16A adalah serius dan penting kerana ia mengubah status responden daripada hanya pengadai pihak ketiga kepada peminjam pinjaman tersebut daripada perayu. Hakim perbicaraan juga menolak hujahan perayu bahawa mahkamah mempunyai kuasa untuk memperbetulkan caj di bawah s 380 KTN. Akibatnya Mahkamah Tinggi mengenepikan caj tersebut kerana tak sah dan tidak betul dari segi undang-undang. Maka rayuan ini di mana perayu berhujah bahawa perlepasan caj akan menjadi tersangat prejudis kepada perayu kerana ia akan dinafikan dengan jaminan bagi pinjaman yang diberikan kepada DP.

**Diputuskan**, menolak rayuan dengan kos:

(1) Autoriti-autoriti yang dirujuk oleh perayu dalam menyokong kesnya adalah berbeza atas fakta (lihat perenggan 18).

(2) Di bawah s 242 KTN, Borang 16A adalah surat cara mandatori bagi pembentukan caj. Dalam kes ini, kesilapan atas Borang 16A adalah penting kerana menunjukkan kepada punca dan sifat caj. Pada hakikatnya caj pihak pertama terbentuk bukan caj pihak ketiga. Dalam keadaan ini, Borang 16A pada dasarnya adalah surat cara yang tidak mencukupi untuk membentuk caj pihak pertama kerana responden tidak menerima jumlah pinjaman daripada perayu. Oleh itu, hakim perbicaraan adalah betul dalam mendapati bahawa lampiran caj tidak dapat memperbetulkan keadaan kerana Borang 16A adalah satu-satunya surat cara yang diterima di bawah s 242 KTN (lihat perenggan 19–20).

(3) Kesilapan bukan hanya kesalahan atau ketinggalan yang boleh diperbetulkan oleh pendaftar hak milik dalam maksud s 380(1)(a)–(c) KTN (lihat perenggan 21). ]]

**Notes**

For cases on charges in general, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 3111–3112.

**Cases referred to**

*Affin Bank Bhd v Mahanbir Singh a/l Manmohon Singh & Anor* [2008] 7 MLJ 14, HC (refd)

*Hassan bin Seman & Ors v Jusoh bin Awang Chik* [1982] 1 MLJ 66; [1982] CLJ (Rep) 110, FC (refd)

*KI Muhiudeen Rawther v KEP Abdul Kassim & Ors* [1959] MLJ 257 (refd)

*Kaysen Construction Sdn Bhd v Kong Wha Housing Development Sdn Bhd & Anor* [2013] 2 MLJ 41, CA (refd)

*Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/o Surian Singh & Ors, Interveners)* [1996] 2 MLJ 431, HC (distd)

*Kuah Chiew Ann v Pendaftar Hakmilik Tanah Wilayah Persekutuan* [2000] 6 MLJ 127, HC (refd)

*McMillan v Dunoon* [2005] VSC 440, SC (distd)

*Mohammad bin Buyong v Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53 (refd)

*Puran Singh v Kehar Singh; Bahadur Singh* [1939] 8 MLJ 71 (distd)

*Sikorski and Sikorski, Re* [1978] OJ No 3509, HC (distd)

*Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2)* [1970] 2 MLJ 226, FC (refd)

*Tan Hee Juan by his next friend Tan See Bok v Teh Boon Keat; Lai Soon* [1934] MLJ 96 (distd)

*Tan Soo Bing & Ors v Tan Kooi Fook* [1996] 3 MLJ 547, FC (refd)

*Tan Yen Yee & Anor v Equity Finance Corp Bhd* [1991] 1 MLJ 237, HC (distd)

*United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352b, HC (distd)

*Upmarket Development Sdn Bhd v Sriera Development Sdn Bhd* [2011] 4 MLJ 681, FC (distd)

*Woon Kim Poh v S'aamah bt Hj Kasim* [1987] 1 MLJ 400, SC (refd)

**Legislation referred to**

National Land Code ss 241(1)(aa), (1)(bb) 242, 243, 380, (1)(a), (1)(b), (1)(c), 340(2)(b), 417, Forms 16A, 16B

**Appeal from**: Originating Summons No 24M-154–04 of 2013 (High Court, Johor Bahru)

*K Gobinath (Kadir Andri & Partners) for the appelant.*
*Gobind Singh Deo (Joanne Chua with him) (Hazlin & Ihab) for the respondent.*

**Vernon Ong JCA:**

INTRODUCTION

**[1]** This appeal by Malaysia Building Society Bhd is against the decision of the High Court setting aside a charge for being void and bad in law.

**[2]** After hearing of counsel for the parties, we dismissed the appeal with costs. In this judgment, the parties shall be referred to as they were in the court below.

THE SALIENT FACTS

**[3]** The salient facts have been concisely captured by the learned judicial commissioner ('JC') in his judgment. They are as follows:

> [2] The plaintiff was awarded a contract by the Government of Malaysia pursuant to a letter of intent issued by the Prime Minister's Department dated 2 March 1996 for a Ministry of Defence Army Camp Project on three pieces of land in Pulai, Johor Bahru ('JB') at a price of RM250m. The three lots of land were:
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> (a) HS(D) 19560, Lot 2967 measuring in area of 308.25 acres;
>
> (b) HS(D) 116425, Lot No 27633 measuring in area of 10.229 acres; and
>
> (c) HS(D) 116424, Lot 27634 measuring in area of 232.457 acres.
>
> In consideration, the Government agreed to transfer to the plaintiff these two pieces of land located in JB:
>
> (a) Lease No 648, Lot 1876, Mukim of Plentong measuring in area of approximately 310.75 acres; and
>
> (b) Lease No 548, Lot 139, Mukim of Tebrau measuring in area of approximately 71.406 acres
>
> [3] Upon negotiations the plaintiff and the Government entered into a privatisation agreement dated 10 July 2007 for privatisation of the project and development on the said land.
>
> [4] On the same date, the plaintiff entered into an assignment agreement with one Kausar Corporation Sdn Bhd ('Kausar') whereby the plaintiff assigned all its rights and benefits under the privatisation agreement ('PA') to Kausar. In return, Kausar agreed to assume all of the plaintiff's obligations and liabilities under the PA.
>
> [5] MBSB Development Sdn Bhd ('MDSB') was thereafter invited by Kausar to participate in the development of the land on a joint venture basis and to share the benefits thereof. As a result, the two parties executed a Joint Venture Agreement ('JVA') pursuant to which they agreed to establish a joint venture company named Definite Pure Sdn Bhd ('DP') to carry out mixed development on the land.
>
> [6] At the request of DP and pursuant to a loan agreement dated 21 October 1997, the first defendant ('MBSB') provided two loan facilities to DP, namely:

(a) a term loan of up to RM465m ('term loan') for principal only inclusive of a land bond ('land bond'); and

(b) Aan advance of up to RM65.1m ('advance').

By virtue of a term of the Loan Agreement, the plaintiff was to create a third party charge against the said land. Vide Form 16A dated 2 August 1999, a charge was created in favour of MBSB on the said land as security for the loan facilities.

[7] Contrary to above term of the agreement, the charge instrument (Form 16A) was registered as a 1st party charge instead of a third party charge whereas the Charge Annexure clearly classifies the charge as a third party charge. Both the plaintiff and MBSB admitted that the Form 16A was a mistake and thus, defective. Hence this application to set aside the charge on the ground that the Form 16A creating the charge was an insufficient instrument that rendered the charge void and invalid.

**[4]** In short, MBSB granted the loan facilities to DP. As security for the term loan, the plaintiff charged the two pieces of land in favour of MBSB. The charge was created pursuant to an instrument in Form 16A and it took effect upon registration on 2 August 1999 (s 243 of the National Land Code ('the NLC')).

**[5]** Even though it was clear to the parties that the charge was to be a third party charge, the charge was subsequently registered as a first party charge.

**[6]** The registration of the charge as a first party charge is due to the fact that in the Form 16A, it is stated that the charge was created for the purpose of securing the repayment to MBSB of a loan of RM465m to the plaintiff, the receipt of which the plaintiff quachargor has acknowledged; in other words, the plaintiff is described as the borrower when in fact it is not. This fact is self-evident in the Form 16A where para (a) was used instead of paras (b) or (c). The relevant portion of the Form 16A in question is reproduced below:

Borang 16A

GADAIAN

(Untuk Menjamin pembayaran wang pokok)

| (Setem hendaklah diletakkan – atau pembayaran cukai diperakui – dalam ruang ini) | |
|---|---|
| UNTUK KEGUANAAN PEJABAT PENDAFTARAN | |
| Ingatan pendaftaran dibuat dalam Dokumen/Dokumen-dokumen Hakmilik Daftar yang dijadualkan dibawah ini mulai dari pukul 10:35 pada 2 haribulan AUG, 1999.<br>Pendaftar/Pentadbir Tanah (tandatangan dan sil)<br>Negeri/Daerah .. JOHOR | Fail mengenai – **Gadian**<br>Jilid .. 4482<br>Folio ..10<br>Perserahan No.<br>35022/99 |

Kami, KCSB KONSORTIUM SDN BHD (No. Syarikat 3999408-A) sebuah syarikat yang di tubuhkan di Malaysia di bawah Akta Syarikat 1965 yang mempunyai alamat berdaftar di No. 2752, Jalan Changkat Permata, Taman Permata, 533 UlluKelang, Selangor Darul Ehsan, tuanpunya tanah yang diperihalkan dalam Jadual dibawah ini;

Bagi maksud menjamin:

(a) pembayaran balik pinjaman sebanyak RM465,000,000.00 yang dengan ini saya mengaku telah terima, kepada pemegang gadaian yang tersebut namanya di bawah ini, beserta faedah/~~tanpa faedah~~;

(b) ~~pembayaran jumlah wang sebanyak RM..... kepada pemegang gadaian yang tersebut~~ namanya di bawah ini, beserta faedah/tanpa faedah, dan sebagai balasan –

.....

.....

(c) pembayaran kepada pemegang gadaian yang tersebut namanya di bawah ini, beserta faedah/tanpa faedah, akan wang yang dari semasa ke semasa kena dibayar kepadanya ~~daripada akaun semasa saya/akaun yang berikut yang disimpan di antara kami;~~

Dengan ini menggadaikan tanah tersebut untuk membayar kepadanya wang yang tersebut itu beserta faedah atasnya mengikut peruntukan-peruntukan yang dilampirkan di sini.

Bertarikh pada 30 haribulan Julai, 1999.

Penyempurnaan suratcara ini oleh KCSB KONSORTIUM SDN BHD (No. Syarikat 3999408-A) dalam satu cara yang dibenarkan oleh Perlembagaannya di bawah Cop Mohor Rasminya dan Cop Mohor itu diturunkan disini pada 30 hb Julai, 1999

(Cop Mohor)

| | |
|---|---|
| (b/t) | (b/t) |
| Pengarah | Pengarah/Setiausaha |

*A charge under the National Land Code*

**[7]** A charge is a form of security over the land or lease of a borrower (first party charge), or over the land or lease of a third party (third party charge) in favour of a creditor who lends money to a borrower. It is intended to enhance a creditor's ability to recover the debt by linking it with a collateral security in the form of a charge over the land or lease.

**[8]** Under the NLC, a charge over land is in the form of a statutory charge, ie a hypothecation. Upon registration, the chargee obtains a statutory interest in the land by way of encumbrance on the title over the land enabling a series of statutory remedies including the obtaining of an order for judicial sale on default (s 241(1)(aa) and (bb) of the NLC ).

**[9]** A charge is therefore a formal transaction whereby the registered proprietor of the land encumbers his land for repayment of a loan. It can be effected only by and on registration of a charge in statutory form (Form 16A to secure payment of the principal sum, or Form 16B to secure payment of a periodic sum) which has been duly stamped.

*MBSB's submission*

**[10]** Learned counsel for MBSB contended that the error or mistake was not fatal so as to invalidate the whole charge under s 340(2)(b) of the NLC (*United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352b; *Tan Hee Juan by his next friend Tan See Bok v Teh Boon Keat; Lai Soon* [1934] MLJ 96; *Puran Singh v Kehar Singh; Bahadur Singh* [1939] 8 MLJ 71; *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/o Surian Singh & Ors, Interveners)* [1996] 2 MLJ 431; *Tan Yen Yee & Anor v Equity Finance Corp Bhd* [1991] 1 MLJ 237; *Upmarket Development Sdn Bhd v Sriera Development Sdn Bhd* [2011] 4 MLJ 681; *McMillan v Dunoon* [2005] VSC 440; *Re Sikorski and Sikorski* [1978] OJ No 3509). Removal of the charge would be highly prejudicial to MBSB as it would be deprived of the security for the loan granted to DP and the court had the power to rectify the mistake under s 380 of the NLC.

**[11]** It was also argued that the court had the necessary jurisdiction under s 417 of the NLC to order rectification of the charge. MBSB did not make any application for rectification as it only became aware of the error when the plaintiff commenced the present action (*Woon Kim Poh v S'aamah bt Hj Kasim* [1987] 1 MLJ 400; *Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2)* [1970] 2 MLJ 226; *Tan Soo Bing & Ors v Tan Kooi Fook* [1996] 3 MLJ 547; *Affin Bank Bhd v Mahanbir Singh a/l Manmohon Singh & Anor* [2008] 7 MLJ 14; *KL Muhiudeen Rawther v KEP Abdul Kassim & Ors* [1959] MLJ 257).

**[12]** In the alternative, it was argued that the mistake may be rectified by the registrar of titles under s 380 of the NLC (*Hassan bin Seman & Ors v Jusoh bin Awang Chik* [1982] 1 MLJ 66; [1982] CLJ (Rep) 110; *Mohammad bin Buyong v Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53; *Kuah Chiew Ann v Pendaftar Hakmilik Tanah Wilayah Persekutuan* [2000] 6 MLJ 127).

**[13]** Learned counsel for MBSB also argued that the plaintiff was a party to the mistake and that the plaintiff should not be allowed to benefit from its own error by having the charge set aside (*Kaysen Construction Sdn Bhd v Kong Wha Housing Development Sdn Bhd & Anor* [2013] 2 MLJ 41).

**[14]** Lastly, it was contended that the plaintiff only filed the application to set aside the charge after a delay of 14 years and that no explanations were given for the delay.

*Decision of the High Court*

**[15]** The learned JC rejected MBSB's argument that the court has the power to rectify the charge under s 380 of the NLC; pointing out that the power is

vested in the registrar of titles and not the court (*Kuah Chiew Ann v Pendaftar Hakmilik Tanah Wilayah Persekutuan* [2000] 6 MLJ 127).

**[16]** The learned JC also held that MBSB's reliance on s 417 of the NLC was misplaced. Section 417 provides for the court to direct the registrar of titles to do all acts that are necessary to give effect to the relevant judgment or order of the court. The party seeking to invoke s 417 should first have obtained a judgment or order relating to land under the relevant provisions of the NLC (*Woon Kim Poh v S'aamah bt Hj Kasim*).

**[17]** The learned JC found that the mistake in the Form 16A is serious and fundamental as it altered the status of the plaintiff from that of a mere third party chargor to a borrower of the loan from MBSB. This altered capacity carried serious implications as to the legal liabilities and obligations of the plaintiff under the charge. The charge annexure could not rectify the situation as the Form 16A was the only instrument recognised under s 242 of the NLC.

DECISION

**[18]** The authorities cited by learned counsel for MBSB in para [10] above are distinguishable on the facts.

**[19]** We agree with the learned JC that under s 242 of the NLC, the Form 16A is a mandatory instrument for the creation of a charge. In the instance case, the mistake on the Form 16A is fundamental as it goes to the root and character of the charge. In essence, a first party charge was created instead of a third party charge.

**[20]** In the circumstances, the Form 16A as it stands is an insufficient instrument to create a first party charge as the plaintiff did not receive the loan sum from MBSB. We also agree with the learned JC that the charge annexure could not rectify the situation as the Form 16A was the only instrument recognised under s 242 of the NLC.

**[21]** Accordingly, we are of the view that the mistake was not a mere error or omission capable of correction by the registrar of titles within the meaning of s 380(1)(a) to (c) of the NLC.

**[22]** For the foregoing reasons, the appeal is dismissed with costs.

*Appeal dismissed with costs.*

Reported by Kohila Nesan